

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 18, 2008 Session

STATE OF TENNESSEE v. RICHARD STEVEN McWHORTER

Appeal from the Criminal Court for Davidson County
No. 2005-C-2283 Steve Dozier, Judge

No. M2007-01803-CCA-R3-CD - Filed July 31, 2008

The defendant, Richard Steven McWhorter, was convicted of driving under the influence, third offense, a Class A misdemeanor, by a Davidson County Criminal Court jury. He was sentenced to a term of eleven months, twenty-nine days, with 120 days to be served in jail at 100 percent service, with the balance of the term to be served on probation. The court revoked the defendant's driver's license for three years and imposed a \$1500 fine. In this appeal, the defendant challenges the sufficiency of the convicting evidence. We hold that the state offered sufficient evidence of the defendant's guilt, and we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

David L. Raybin and Sara S. Richter, Nashville, Tennessee (on appeal), and Edward M. Yarbrough, Nashville, Tennessee (at trial), for the appellant, Richard Steven McWhorter.

Robert E. Cooper, Jr., Attorney General and Reporter; James E. Gaylord, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Matthew P. Stephens, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the defendant's trial, Officer Michelle Steidl of the Metro Nashville Police Department DUI Unit testified that she was patrolling on October 17, 2004, and saw the defendant speeding on West End Avenue after 1:00 a.m. She stopped the defendant, who pulled into a gas station and parked at a pump. She said the defendant seemed surprised when she approached his car. She said that the defendant had red-rimmed, bloodshot eyes and that she noticed "an obvious odor of alcoholic beverage about him and his vehicle." She described his speech as slightly slurred. She said the defendant was sweaty, shirtless but wearing a jacket, and had his belt unbuckled. She said she thought the defendant might be under the influence of alcohol and asked him to perform field

sobriety tests. She said the defendant performed poorly on both the walk-and-turn test and the one-legged stand test. She said that on the walk-and-turn test, the defendant could not keep his balance, missed placing his heel to his toe more than once, stopped walking, and stepped off the line more than once. She said that the defendant exhibited four of eight possible clues of impairment on the test. She said that on the one-legged stand test, the defendant lowered his leg and asked her to repeat the directions, raised his arm to assist in balancing himself, and put his leg down before completing the count to ten. She said he exhibited two of four possible clues on impairment on this test. She said that based upon the defendant's performance on the tests, his demeanor, and the smell of alcohol, she believed he was impaired and arrested him for DUI. She said that she read the defendant information about the implied consent law but that he declined to take a breath test.

Officer Steidl testified that a camera in her patrol car made a video recording of her encounter with the defendant. She admitted, however, that the microphone was not functioning and did not record any sound of the encounter. She also admitted that the defendant was out of the range of the camera during some of the field sobriety testing. She said that the reason was that she took him to a level place with a straight, painted-on line for the testing and that she was not intentionally taking him out of range of the video recording. She testified that the defendant denied that he had been drinking, stated he had been at The Tribe dancing, and asked to be cited for reckless driving.

The video of Officer Steidl's stop of the defendant was played for the jury during her testimony. On it, virtually none of the walk-and-turn test is visible. The tape depicts the defendant swaying, raising and lowering his arms, and raising and lowering his leg while trying to maintain his balance during the one-legged stand test.

Officer Steidl acknowledged on cross-examination that there might be reasons other than intoxication which would cause a person's eyes to be red and bloodshot late at night, that the defendant might have slurred speech from being thirsty after dancing or being nervous because he was stopped by the police, and that a person might have the odor of alcohol despite having had only one drink. She said, however, that all three of these things together were generally indicative of intoxication.

Kerry Pogue testified on behalf of the defendant, with whom he played on a softball team. He said that on the night in question, he saw the defendant at a Halloween party. He said that although he was sure that drinking of alcohol took place, there were children and a church group present and the party was not a "drinking party." He said that about 10:30 or 11:00 p.m., a group of people including the defendant and himself decided to go to a nightclub called The Tribe to dance. He said he did not ride in the same car as the defendant. He said that he was sure the defendant had a drink at The Tribe. He said that he did not drink alcohol and that he assessed everyone, including the defendant, before they left to be sure he did not need to give anyone a ride home. He said he was sure the defendant was not under the influence.

Donna Wooden testified that she was a friend of the defendant's through their workplace. She said that the defendant called her in October 2004 and asked her to pick him up and take him

to the police impound lot to retrieve his car. She said that she followed the defendant when he retrieved his car and that the car was not running properly and would speed up and slow down. She said that the defendant took the car to a repair shop and that she took him to work.

The defendant testified that he went to a Halloween party on October 16, 2004, arriving between 5:30 and 6:00 p.m. He said he drank two cocktails of Campari and soda at the party. He described Campari as an Italian bitters liquor with a strong odor. He said that he had no other alcohol after the party and that he drank club soda at The Tribe. He said that he became hot and sweaty from dancing at the club and that he removed his shirt, placed it in his back pocket, and wore his jacket. He said that Mr. Pogue assessed him to be sure he was not under the influence before he left. He said he was not under the influence.

The defendant testified that his car was not working properly on the night of his arrest. He said it stalled when he tried to start it and that once the engine was running, the car would leap forward when he pressed on the gas and then would stop. He said he later learned the problem was a faulty catalytic converter. He said that he drove down West End rather than getting on the interstate due to the problem with the car. He acknowledged that he might have stepped on the gas hard enough to cause the car to go fifty miles per hour, but he said his concern was that the car would stall. He said that he noticed blue lights behind him and that he pulled over at the first safe place, a gas station.

The defendant denied that during his encounter with Officer Steidl he stumbled, had difficulty walking, or slurred his speech. He said he was hot and thirsty from dancing but that he was “in control” of himself. He said that his belt was unbuckled because it was tight and he had loosened it when he got into the car. He said he thought he performed the field sobriety tests satisfactorily. He said he refused the breath test after receiving the implied consent admonitions because he had always heard that breath tests were unreliable.

The defendant testified that when he picked up his car the following Monday, it was malfunctioning just as it had on the night of his arrest. He said that he took the car to a repair shop and that after the catalytic converter was replaced, the car operated normally.

After receiving this evidence, the jury found the defendant guilty of driving under the influence. The court proceeded to the second stage of the bifurcated trial, in which the state offered proof of the defendant’s two previous DUI convictions. The jury found that the defendant was guilty of third offense DUI.

The only issue before us on appeal is the sufficiency of the evidence that the defendant was under the influence of alcohol on the night in question. Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all

conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The defendant was convicted under Tennessee Code Annotated section 55-10-401(a)(1), which states:

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant . . .[.]

The defendant argues that the evidence is not sufficient to establish the defendant's guilt beyond a reasonable doubt because all of Officer Steidl's observations regarding the defendant's bloodshot, red eyes, having an odor of alcohol, and slurred speech were explained by defense proof. He also argues that the officer's testimony about the defendant's performance on the field sobriety tests is subjective and is not entirely documented by the video, that any unsteadiness the defendant exhibited on the tape may be explained by something other than intoxication, and that the defendant's proof was that he had only two drinks containing alcohol that evening. The defendant's arguments are an invitation to this court to reweigh the evidence and make our own credibility determinations. However, this is the province of the jury, which we may not invade upon appellate review. See Sheffield, 676 S.W.2d at 547; Cabbage, 571 S.W.2d at 835.

The evidence in the light most favorable to the state demonstrates that Officer Steidl observed the defendant to have red, bloodshot eyes, an odor of alcohol, and slurred speech. Officer Steidl testified that although these three symptoms might have innocuous explanations individually, the simultaneous occurrence of all three was generally an indication of impairment. Officer Steidl testified that the defendant performed poorly on field sobriety tests, some of which is visible on the video from Officer Steidl's police car. A rational jury could accredit this evidence over the defendant's proof. We hold that the evidence is sufficient to support the defendant's conviction.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE